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No. 95-1419

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

THE KIOWA TRIBE OF OKLAHOMA,

Petitioner,

v.

ROBERT M. HOOVER, JR.,

Respondent.

On Petition For Writ Of Certiorari To
The Supreme Court Of Oklahoma

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioner, The Kiowa Tribe of Oklahoma, (the "Tribe") respectfully replies to Respondent's Brief in Opposition to Petition for Writ of Certiorari.

OKLAHOMA HAS NO AUTHORITY TO ENTER A MONEY JUDGMENT AGAINST THE TRIBE

Respondent correctly observes that disputes between state and tribal sovereigns over taxation and regulation have, even in the absence of tribal consent to suit, led to the exercise of judicial power over tribes. (See Petition for Writ of Certiorari, p. 7). The Oklahoma Supreme Court, however, has stretched the taxation and regulatory analysis of tribal sovereignty into justification for exercising jurisdiction over a private damage suit against an Indian tribe. It is this stretching that has put the Oklahoma Supreme Court into direct conflict with both this Court and with overriding Congressional goals.

In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991) this Court exercised jurisdiction to resolve a dispute concerning tribal responsibility for collection of Oklahoma's cigarette tax. The Court imposed upon the tribe an obligation to assist Oklahoma in collecting a validly imposed state tax. But, this Court refused Oklahoma's request for a damage judgment against the tribe. In refusing Oklahoma's request for a damage judgment, this Court plainly recognized both tribal immunity and that tribal immunity was a factor in Congress' "overriding goal" of encouraging tribal self sufficiency and economic development. 111 S.Ct. at P. 910. *Citizen Band* shows, in a single case, the difference in approach between taxation disputes and damage suits.

Quite simply, in this case, the Oklahoma Supreme Court has done exactly what this Court found improper in *Citizen Band*. In the time since this Court decided *Citizen Band*, there has been no change either in the law of tribal immunity or in Congress's overriding goals concerning federally recognized Indian tribes. Thus, the conclusion must be that the Oklahoma Supreme Court is determined to pursue a course that directly conflicts with both decisions of this Court and Congressional policy.

The fallacy of the Oklahoma Supreme Court's position is demonstrated by comparing the Oklahoma Supreme Court opinion in this case, ("Only that litigation which is explicitly withdrawn by Congress or which infringes upon tribal self-government stands outside the boundaries of permissible state-court cognizance" [Appendix, Petition For Writ of Certiorari, p. 7]) to this Court's opinion in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940) ("Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." 60 S.Ct. at 657) In short, Oklahoma assumes its own power, in the absence of a Congressional withdrawal of that power. On the other hand, federal law assumes tribal immunity, in the absence of tribal consent or Congressional abrogation of that immunity. The two approaches are directly contrary.

OKLAHOMA INTENDS TO CONTINUE ENTERING MONEY JUDGMENTS AGAINST INDIAN TRIBES

On March 5, 1996, the Oklahoma Supreme Court decided *First National Bank v. Kiowa, Comanche and Apache Intertribal Land Use Committee*, No. 84,301, 67 Okla. B.J. 871 (March 9, 1996) and used its decision in this case to find state court jurisdiction over a private damage suit against federally recognized Indian tribe. (See Appendix hereof for text of the *First National Bank* opinion) In *First National*, however, two Justices of the Oklahoma Supreme Court, dissented and expressly stated that the Oklahoma Supreme Court is in direct conflict with the decision of the Court of Appeals for the Tenth Circuit in *Sac & Fox Nation v. Hanson*, 47 F.3d 1061 (10th Cir. 1995) *cert. denied* ____ U.S. ____, 116 S.Ct. 57, 133 L.Ed.2d 21 (1995). Thus, contrary to Respondent's suggestion, a clear conflict exists between the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit.

The *First Nation Bank* decision makes clear: (1) the Oklahoma Supreme Court and the Court of Appeals for the Tenth Circuit are in direct conflict upon a question of state power over commerce and relations with Indian tribes (2) the Oklahoma Supreme Court, upon re-visiting the conflict, unmistakably chose to remain in conflict with the Court of Appeals for the Tenth Circuit.

The Oklahoma Supreme Court has now made its position absolute. This case is not an aberration, but, rather, it is a major shift in Oklahoma's policy toward federally

recognized Indian tribes. By intentionally choosing to remain in conflict with the Court of Appeals for the Tenth Circuit, the Oklahoma Supreme Court invites review.

As suggested in the Petition for Writ of Certiorari, absent Supreme Court review, the thirty-six Oklahoma based Indian tribes that wish to protect their federally recognized immunity must seek federal court injunctions against state court judges. Such a remedy, however, is narrow. It is perhaps narrower than the Tribe initially recognized. *See Seminole Tribe of Florida v. Florida*, 64 U.S.L.W. 4167 (March 27, 1996) (Amendment XI immunity is not abrogated by Indian Gaming Regulatory Act). If Oklahoma will not recognize tribal immunity and the federal injunctive remedy is narrow, then Oklahoma is left with much room to tinker freely with Indian commerce and Indian tribes -- areas in which states are divested of virtually all authority. *Id. at 64 U.S.L.W. 4712*. Because the injunctive remedy is narrow and because the federal matters of relations and commerce with Indian tribes should not be decided by states, it is appropriate to resolve this conflict by Supreme Court review.

SOVEREIGN IMMUNITY DOES NOT CEASE TO EXIST MERELY BECAUSE A TRIBE ACTS OUTSIDE INDIAN COUNTRY

Respondent again draws upon taxation and regulatory jurisprudence, this time to argue that tribal immunity has a "geographical component." Presumably, Respondent makes this observation to suggest that an Indian tribe, if caught off Indian Country, is not due, from the state, full recognition

of its status as an Indian tribe. Admittedly, taxation and regulation disputes between sovereign entities inescapably involve inquiry into the geographical location of key events. The location of the "taxable event" or the location of the object of regulation are tools to determine what sovereign's law applies. But, using geography as a tool to choose between competing sovereign laws is far removed from using geography as a reason to ignore an essential characteristic inherent in the nature of a sovereign.

This case is less an issue of geography and more an issue of a federally recognized Indian tribe's essential and inherent nature. This case bring into question the power of a state to re-define, in direct conflict with federal law and Congressional policy, an Indian tribe's essential and inherent nature. If states are to strip Indian tribes of the essential characteristics attributed to them by federal law -- including the characteristic of immunity -- then the state must get that power from the federal government. States have no such inherent power. This is so because relations and commerce with Indian tribes are within the exclusive province of the federal government. United States Constitution, Article I, sec. 8, cl. 3; Article 2, cl. 2; *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 105 S.Ct. 1245, 1251, 84 L.Ed.2d 169 (1985). Here, Oklahoma is plainly assuming the power unto itself.

Because the Oklahoma Supreme Court has stretched existing law to the point that it has raised an important issue of state power over Indian affairs, certiorari is proper. *Williams v. Lee* 358 U.S. 217, 91 S. Ct. 269, 3 L.Ed.2d 251 (1959).

CONCLUSION

For the reasons above, the writ of certiorari should be granted.

Respectfully submitted,

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